FILE COPY

No. 218

Office - Supreme Court, U.S.
FILED
JUL 28 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

EMORY W. PARSONS AND ERMA M. PARSONS,
Petitioners, No. .....

HOWARD H. PARSONS AND MARTHA PARSONS,
Petitioners, No. .....

LAWRENCE H. PARSONS AND GRACE E. PARSONS,
Petitioners, No. .....

v.

FRANCIS R. SMITH, Former Collector of Internal Revenue for the First District of Pennsylvania,
Respondent.

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

EDGAR J. GOODRICH
LIPMAN REDMAN
607 Ring Building
Washington 6, D. C.
Attorneys for Amicus Curiae

Of Counsel:
GUGGENHEIMER, UNTERMYER & GOODRICH
607 Ring Building, Washington 6, D. C.

WILSON-EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

TABLE OF CONTENTS

	PAGE
INTEREST OF AMICUS CURIAE	1
QUESTION PRESENTED	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	10

CITATIONS

Cases.

Barry, Inc., Paul E., 14 T.C.M. 37 (1955)	3
Brown, Helen C., 22 T.C. 58 (1954) acq. 1954-2 Int. Rev. Cum. Bull. 3	3, 8
Burton-Sutton Oil Co. v. *Commissioner*, 328 U.S. 25 (1946)	5
Gregory Run Coal Co., Commissioner v. 212 F.2d 52 (1954)	3, 6, 8
Hamill Coal Corp., Commissioner v. 239 F.2d 347 (1956)	3, 6, 8
Mammoth Coal Co., Commissioner v. 229 F.2d 535 (3d Cir. 1955)	3, 7, 8
Palmer v. *Bender*, 287 U.S. 551, 557 (1933)	5
Ruston, James, 19 T.C. 284 (1952) acq. 1953-2 Int. Rev. Cum. Bull. 6	3, 8
Southwest Exploration Co., Commissioner v. 350 U.S. 308 (1956)	3, 5, 10
Stilwell v. *U.S.*, 250 F.2d 736 (4th Cir. 1957)	7
Usibelli v. *Commissioner*, 229 F.2d 539 (9th Cir. 1955)	3
Weirton Ice and Coal Supply Co. v. *Commissioner*, 231 F.2d 531 (1956)	3, 6, 8
Winfield Mining and Contracting Co., 13 T.C.M. 571 (1954)	3

GCM 26250

IN THE

Supreme Court of the United States

October Term, 1958

EMORY W. PARSONS AND ERMA M. PARSONS,
Petitioners, No. .....

HOWARD H. PARSONS AND MARTHA PARSONS,
Petitioners, No. .....

LAWRENCE H. PARSONS AND GRACE E. PARSONS,
Petitioners, No. .....

v.

FRANCIS R. SMITH, Former Collector of Internal Revenue for the First District of Pennsylvania,
Respondent.

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Estate of John Schumacher, as amicus curiae, with the consent of petitioners and respondent (through the Solicitor General), hereby petitions the Court in support of the Petition For Writs Of Certiorari of the above-named petitioners to review the judgments of the United States Court of Appeals for the Third Circuit in the above-captioned cases.

INTEREST OF AMICUS CURIAE

The issue here involved—whether a strip miner of coal has an economic interest and is therefore entitled to depletion on his income for mining—is the same issue involved in a series of cases now pending in the District Court of the United States for the Eastern District of Pennsylvania: *Estate of John Schumacher* v. *U. S.*,

Docket Nos. 13,191 and 13,189; *Estate of Henry E. Schultz* v. *U. S.*, Docket Nos. 13,190 and 13,192; and *Robert Rowland* v. *U. S.*, Docket No. 14,625. In addition the listed taxpayers (all of whom are represented by undersigned counsel) have the same issue in other tax years involved in other cases now pending, in which refund claims have been filed and rejected and suit about to be filed, probably in the United States Court of Claims.

QUESTION PRESENTED *

Is a strip miner of coal entitled to a share of the percentage depletion allowance where he mines the coal pursuant to a contract giving him the exclusive right to extract coal from a particular property and where he is paid only upon the discovery and extraction of the coal, or does he lose this right because his pay is not dependent upon the price at which someone else ultimately sells the coal and because the other party to the contract has the right to terminate the contract?

STATEMENT

There is no dispute that the petitioners here realized income from the conduct of strip mining operations for which they were paid by contract only for the coal actually discovered, uncovered, extracted and delivered. Nonetheless the Court below denied depletion to the strip miners on three grounds. **First**: that the right to depletion is contingent upon the "commitment of capital as an investment in the exploitation of a given mineral deposit [which commitment of capital] must be real and unequivocal", and that this requirement is not satisfied where the strip miner's only "investment [is] in equip-

* The same question is presented in the three cases of *Huss* v. *Commissioner*, Nos. 12,315, 12,317 and 12,319, decided by the Court below on the same day on which the present cases were decided. Counsel understands that the taxpayers there propose to file a petition for writ of certiorari.

ment of general utility". **Second**: since the strip miner was "entitled only to an agreed price" which "did not fluctuate with the market, there is nothing about the scheme of agreement to indicate any interest of the contractor in the mineral". **Third**: since the contract was terminable on 10-days' notice by either party, the "logical conclusion . . . is that the partnership [the strip miner] contemplated and bargained for no economic interest in the mineral".

a. The first of these grounds is in direct conflict with this Court's decision in *Commissioner* v. *Southwest Exploration Company*, 350 U.S. 308 (1956), and with every decision * allowing any strip miner to deduct depletion.

b. The second basis of the decisions below is in direct conflict with (1) three decisions of the Fourth Circuit Court of Appeals,** (2) the earlier decision of the Court below in *Commissioner* v. *Mammoth Coal Company*, 229 F.2d 535 (3d Cir. 1955), and (3) the government's position as set forth in its brief in the Court below.

---

* See, for example, in addition to the decisions of the Third and Fourth Circuit Courts of Appeals cited in the body of the petition, *Paul E. Barry, Inc.*, 14 T.C.M. 37 (1955); *Helen C. Brown*, 22 T.C. 58 (1954) acq. 1954-2 Int. Rev. Cum. Bull. 3; *Winfield Mining and Contracting Co.*, 13 T.C.M. 571 (1954); *James Ruston*, 19 T.C. 284 (1952), acq. 1953-2 Int. Rev. Cum. Bull. 6.

** In *Weirton Ice and Coal Supply Company* v. *Commissioner*, 231 F.2d 531 (1956); *Commissioner* v. *Hamill Coal Corporation*, 239 F.2d 347 (1956); and *Commissioner* v. *Gregory Run Coal Company*, 212 F.2d 52 (1954). The only other appellate court decision on the question is *Usibelli* v. *Commissioner*, 229 F.2d 539 (9th Cir. 1955) which the Fourth Circuit in *Weirton*, *supra*, distinguished on the grounds that the strip miner's contract was a one-year contract for the U.S. Army which contracted to pay a certain sum for services rendered so that the taxpayer did not depend upon the severance of the coal for his income. If this distinction is not valid, *Usibelli* might be considered as supporting the decisions below, in which event both sets of decisions are in conflict with the cited decisions of the Fourth Circuit.

c. The third ground relied upon by the Court below conflicts with the decisions of the Fourth Circuit Court of Appeals referred to in the preceding paragraph.

d. The decisions below make it difficult, if not impossible, for the participants in the strip mining business to understand their respective tax rights and liabilities and to plan their strip mining operations in an orderly business-like way.

REASONS FOR GRANTING THE WRITS

1. The decisions below are in direct conflict with the decisions of this Court in *Commissioner* v. *Southwest Exploration Company* and in other cases outlining the fundamental aspects of depletion.

a. The conflict with *Southwest Exploration Company* follows from the stress laid by the Court below on the type of capital investment required to support the depletion allowance. That Court said that the investment in machinery suitable for other than stripping purposes does not constitute the kind of investment needed to warrant the allowance of depletion (with the implication that the purchase of one-purpose machinery might suffice). This point is without meaning here. The type of investment talked of with regard to depletion has nothing to do with machinery of any kind or the expenditure of money to buy a lease or fee or the outlay of any sum of money for any such purpose. As this Court said in the *Southwest Exploration Company* case, (350 U.S. at 312), depletion "continues so long as minerals are extracted, and even though no money was actually invested in the deposit".

The "capital investment" talked of here is synonomous with "economic interest": the investment to be recovered is the taxpayer's economic interest in the coal in place and to be extracted. Were this not so, no stripper would ever have the kind of investment which would support

the depletion allowance. If the law required a cash outlay for the purchase of "something depletable", no strip miner would ever be entitled to depletion.

The opinion of the Court below on this point conflicts with every decision allowing depletion to a strip miner, as well as with this Court's decision in *Southwest Exploration Company.*

b. The many other decisions of this Court with which the decisions below conflict are best typified by *Palmer* v. *Bender,* 287 U.S. 551, 557 (1933). In its decision in *Southwest Exploration Company,* this Court describes as follows the two basic requirements for depletion laid down in *Palmer* v. *Bender*:

> " . . . a taxpayer is entitled to depletion where he has: (1) 'acquired, by investment, any interest in the oil in place,' and (2) secured by legal relationship income derived from the extraction of the oil, to which he must look for a return of his capital."

The Court below either ignored these rules or forgot that both of them are satisfied here. The strip miner here acquired the exclusive right to strip mine coal from a designated area; he committed his assets and his entire business operation to finding and extracting the coal; he assumed all the risks inherent in finding and getting the coal out of the ground; and he was paid only if he found, extracted, and delivered the coal as per contract.

The denial of depletion to the strip miner under these circumstances (because of what really are secondary or extraneous circumstances) ignores the basic concept of depletion as that concept has been outlined by this Court, in *Palmer* v. *Bender,* and in such cases as *Burton-Sutton Oil Company* v. *Commissioner,* 328 U.S. 25 (1946).

2. The decisions below are in direct conflict with the decisions of the Fourth Circuit Court of Appeals.

This is true in two fundamental respects.

a. The first concerns the significance awarded by the Court below to the fact that the strip miner was paid a

fixed price per ton which did not fluctuate with the price at which the coal company sold the coal on the open market. The Fourth Circuit Court has held in a number of cases that the method of payment has nothing to do with the right to depletion. *Commissioner* v. *Gregory Run Coal Company,* (the first appellate court decision on the question), *Weirton* and *Hamill,* all *supra.* Those cases hold in effect that if strip miners A and B have identical rights, which would entitle them to depletion, the fact that A is paid a fixed price per ton for the identical mining operations can not operate to produce a tax result for him directly opposite to what is applicable to B just because the latter's pay fluctuates with the price of the coal on the coal market.

The method of payment to the strip miner has no bearing on the question of the existence in the first instance of an "economic interest", on the question of the federal income tax significance of the right to extract coal from particular property, when the extractor is paid, if, and only if, and when, the coal is extracted, thereby assuming all the risks inherent in finding and getting the coal out of the ground.

We urge that this fundamental proposition in no way depends upon whether the strip miner's economic interest in the coal continues *after* it has been discovered and mined and turned over to the coal company or anyone else for sale.

b. The second fundamental respect in which the decisions of the Court below conflict with the Fourth Circuit decisions concerns the termination clause. In the *Weirton* case (231 F. 2d at 635), that Court stated:

> "It is of no moment that the owner of the mineral, as in other cases in which the right of an extractor to a deduction for depletion has been upheld, had the option to terminate the arrangement at any time, for as the event proved Weirton actually mined the coal during all of the taxable years."

The Fourth Circuit reached the same conclusion in the *Gregory Run* and *Hamill* cases despite the right of the coal company in those cases to terminate on 30 and 90 days' notice respectively.*

We urge that these cases and the dissent below are sound. The contract power to terminate the stripper's economic interest has nothing to do with the existence of that right in the first instance. The power of termination is relevant only if it is actually exercised and then only because it may affect gross income from mining which thus in turn affects the amount of depletion allowance. But these quantitative considerations are of no greater moment here, in relation to the basic question of the *right* to depletion, than are such things as the cost and life of an asset in relation to the existence of the *right* to (as opposed to the amount of) depreciation. Obviously, the lower the cost and the longer the life of an asset, the smaller the amount of the annual deduction for depreciation. But the *right* to any deduction at all exists even if the asset cost $10.00 and has a life of ten years. So here: the cancellation of a contract or the reduction of the tonnage to be mined may reduce the amount of the income from mining and therefore necessarily the amount of the deduction for depletion. But these *quantitative* considerations have no other relevance. They cannot affect the basic, initial question of whether there is an economic interest to start with.

3. The decisions of the Court below conflict with its own earlier decision in *Commissioner* v. *Mammoth Coal Company*.

---

* Cf. *Stilwell* v. *U.S.* 250 F.2d 736 (4th Cir. 1957) where, after citing with approval its three earlier decisions listed above, the Fourth Circuit held that there was no right of termination, but then went on, unnecessarily, to use language—in one sentence—which could indicate some confusion as to the significance of terminability. The Court below made no point of this and in fact included *Stilwell* in the same category with the other three Fourth Circuit decisions which the Court below described as "recent borderline cases".

In that case the Third Circuit Court of Appeals allowed a strip miner to deduct depletion even though he was paid a fixed price per ton—precisely as here. The Court there said (229 F. 2d at 538):

> "The fact that, instead of retaining coal, the stripper received so much per ton for that coal which first had to be offered to and accepted by the . . . [coal company] should make no difference, for in any event the stripper had to look to the coal which it mined for return of its investment and profit."

The decisions below in the instant case thus necessarily emasculate the earlier opinion of the same court in *Mammoth*. As already indicated, they thus conflict necessarily also with the Fourth Circuit decisions cited above.

4. The decisions below go beyond the point urged by the Government in its brief below.

a. This is true with regard to the method of payment point. In its brief below (page 18), the Government said:

> "When an agreement defines a particular area in which a strip miner is to work and grants to him the exclusive right to mine that area until the mineral supply is exhausted, and provides that all coal mined is to be delivered to the land owner *in return for a stated amount per ton delivered*, it is our position that the miner's relationship with the mineral in place is such as to entitle him to an allowance for depletion; the existence of his interest is coterminous with the existence of the mineral deposit and as each ton of coal is extracted that interest necessarily becomes less valuable." (emphasis added)

The use by the Court below of this factor to support a conclusion opposite to (a) its own decision in *Mammoth*, (b) the Fourth Circuit decisions in *Gregory Run*, *Hamill* and *Weirton*, and (c) the government's brief below, is a source of confusion to be clarified.

b. This is true also with regard to the reliance by the Court below on the need for investment in the form of a

cash outlay for certain type of equipment. We do not believe that the government urged that argument and do not believe that the government's policy in administering the applicable provisions of the Internal Revenue Code includes any such argument. On the contrary, the government has acquiesced in several decisions giving a share of the depletion allowance to strip miners. See for example the *Brown* and *Ruston* cases, *supra*.

5. This is an important question in the mining industry which warrants consideration by this Court to resolve the various conflicts outlined above.

As the government stated in General Counsel's Memorandum 26290, 1950-1 Internal Revenue Bulletin, 42, 43:

> "In the mountainous coal fields of the East there are few large areas which can be mined by removing the overburden, and the owner or lessee of the property does not ordinarily buy the necessary stripping equipment. Accordingly, in the case of small tracts of coal land from which the mineral cannot be economically removed by underground mining, as well as in situations in which a fringe of coal near the surface cannot be satisfactorily extracted by underground methods, the contractor who owns stripping equipment has solved a problem of the industry."

It is believed that beside the petitioners here and in the *Huss* cases, and amicus curaie, there are many other taxpayers engaged in the business of strip mining under sufficiently similar circumstances to make it a matter of great concern to secure clarification of the method of allocating depletion between the strip miners and the coal companies. Needless to say, the coal companies with whom these stripping contracts are negotiated have the same interest. And of course the Internal Revenue Service itself needs guidance in determining and applying a policy as to which cases are properly subject to settlement and which are to be litigated.

It is no answer to say that it is a question of fact in each case. As the dissenting judge below pointed out, "I do not regard . . . the criteria to be applied . . . [as] too vague to do so on other than the basis of 'the reasonable man'. To the facts must be applied statute and the specific rules pronounced by the Supreme Court in the interpretation of it. That is the teaching of *Commissioner* v. *Southwest Exploration Co.*" The decisions below are founded upon three keystone points on the basis of which the Court below denied depletion to a strip miner. We respectfully urge that the Court below erred in the significance it gave to each of those three factors. That error conflicts not only with numerous court decisions, as outlined above, but also with the underlying concepts of depletion in the coal strip mining area.

CONCLUSION

As explicitly set forth in the dissent below on the petition for rehearing, the decisions below are in direct conflict with the decisions of this Court, of the Fourth Circuit Court of Appeals, and of the Court below, thereby confusing important issues which only this Court can clarify. For these reasons, it is respectfully submitted that the Petition For Writs Of Certiorari be granted.

Respectfully submitted,

EDGAR J. GOODRICH
LIPMAN REDMAN
607 Ring Building
Washington 6, D. C.
Attorneys for Amicus Curaie

Of Counsel:

GUGGENHEIMER, UNTERMYER & GOODRICH
607 Ring Building, Washington 6, D. C.

218

305

LE COPY

Office-Supreme Court, U.S.
FILED
SEP 16 1958
JAMES R. BROWNING, Clerk

Nos. 219 and 315

In the Supreme Court of the United States

OCTOBER TERM, 1958

EMORY W. PARSONS, ERMA M. PARSONS, ET AL., PETITIONERS

v.

FRANCIS R. SMITH, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

GEORGE HUSS, ET AL., PETITIONERS

v.

FRANCIS R. SMITH, FORMER COLLECTOR OF INTERNAD REVENUE FOR THE FIEST DISTRICT OF PENNSYLVANIA

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

---

MEMORANDUM FOR THE RESPONDENT

LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 218

EMORY W. PARSONS, ERMA M. PARSONS, ET AL., PETITIONERS

v.

FRANCIS R. SMITH, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

No. 305

GEORGE HUSS, ET AL., PETITIONERS

v.

FRANCIS R. SMITH, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

---

MEMORANDUM FOR THE RESPONDENT

The issue presented in these cases is whether the taxpayers who are members of partnerships which, under contract with the owners of coal lands, engaged in the business of strip mining coal for the owners